No. 13051

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.", and CRANE BARGE NO. 25, RUSSELL FAMILY, INC., RUSSELL TOWBOAT AND MOORAGE COMPANY,
Appellees.

REPLY BRIEF OF APPELLANT OREGON-WASHINGTON BRIDGE COMPANY, a Corporation.

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-51

SUBJECT INDEX

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INTRODUCTION

When we keep in mind the close tie-in between Russell Towboat and Moorage Company and Russell Family, Inc., as shown by the testimony of Lew Russell, Jr. (Ap. 275) who said he is President and Manager of Rus-

sell Towboat and Moorage Company and Secretary and Manager of Russell Family, Inc., we are not surprised to find both of these organizations attempting to spell out some acceptable theory to sustain the judgment of the Trial Court and to place the responsibility for the accident out of which this claim arose upon appellant. Notwithstanding this concerted effort, we find very little in the briefs filed on behalf of appellees which necessitates answer and nothing which sustains or justifies the conclusion reached by the Trial Court.

We again point out that the only possible fact found by the Trial Court which can in any way subject appellant to criticism is that appellant had no auxiliary or emergency flag or whistle to use in the event of a power failure. We again remind this Court that the Trial Court was not justified in its conclusion of law that appellant failed to exercise due diligence in this respect. We likewise reiterate that the evidence is clear that no auxiliary equipment reasonably suggested by any of the evidence in the case could have been used effectively or would have been observed or comprehended by appellees, or their agents. It must be remembered that even the Trial Court did not conclude that appellant should have both an auxiliary whistle and an emergency signalling device. The Trial Court merely concluded that appellant should have one or the other.

As we pointed out in our opening brief, whistles had been uniformily blown when equipment went through the raised draw span. All of those who testified on behalf of appellees who had gone through the bridge when

the span was lifted testified that they had never heard any whistle blown. In the face of this testimony, how can it be contended that an emergency whistling device could have prevented the accident? If a flag had been provided it is obvious that it would have been of no avail. When the operator of the tug had his eyes so fixedly glued on the top of the boom and directed toward the center of the lift span, necessarily he would not have seen a flag waved from the control tower at the north end of the span. The evidence is clear that the bridge tender, Mr. Adams, could not have reached the center of the lift span between the time the power failed and the moment of impact. It is obvious that a flag would not have been as readily accessible as was Mr. Adams' hat. The flag necessarily would have been placed or stored somewhere about the bridge. It would not have been on Mr. Adams' person as was his hat. Whatever time it took him to go to and obtain the flag, wherever located, would have been deducted from the time available for him to give the signal.

We fail to see anything in the record which would justify a conclusion that a reasonably prudent operator of a bridge constructed and located as is the one in question should have an emergency whistle or an auxiliary flag or signal. The record is conclusive that no flag or signal or whistle could have stopped the operator of the tug and tow. The record conclusively shows that the lack of flag or auxiliary whistle was in no way proximately connected with the accident or the damage sustained.

POINT I

Appellees must establish two important factors befor they can rely upon the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic:

(a) Such vessel must have given proper signal to open the bridge;

(b) Such vessel must prudently proceed under slow speed. Inasmuch as the regulation in effect at the time the collision occurred out of which this claim arises expressly required the vessel to give a whistle signal before proceeding through the draw, the operator of the tug had no right to presume that the draw was raised for his passage until after he had given the signal required by regulation. It may be true as argued by proctors for appellees that insofar as the operator of the bridge was concerned, no different procedure would have been followed had the whistle signal required by regulation been given. This does not answer the question. Appellees were charged with knowledge that the bridge regulations required appellant to raise the draw at frequent intervals for the purpose of testing its operation. For all the tug operator knew at the time he chose to assume that the bridge had been raised for his passage, appellant was not intending to let him through and did not raise the span for his use, but merely raised it for test purposes. If he had given the signal required by regulation, and thereafter the bridge had been raised and come to a stop,

he might then justify his contention that such stoppage was an invitation to proceed; that he had the right to assume that the bridge was ready for his use, and in the absence of such readiness a presumption might arise that appellant was negligent. No such assumption, no such presumption and no such result follows when the necessary precedent signal had not been given.

Even in the Louise Rugge, 234 F. 768, which is about the most favorable case anyone has been able to find in support of appellees' contention, the ruling of the court is based on the proposition that the tug and lighter below a draw bridge blew for the bridge to open and then waited until the bridge got up before proceeding at half speed to go under the opened draw. This premise is set out in the language appearing at p. 4 of Brief of Appellee, Russell Family, Inc. It should also be noted in the Louise Rugge case that the vessel was proceeding through bridges on the Passaic River. Apparently these bridges were very numerous and closely spaced.

This court will take judicial notice that the Hood River-White Salmon Bridge is in an isolated spot on the Columbia River and that there is no other bridge within twenty river miles thereof. It certainly cannot be contended that the tug and tow were being operated prudently or were prudently proceeding when they had no one on lookout, when the operator was knowingly in a poor position accurately to determine whether or not the top of the boom on the derrick barge would go under the raised span and when he did not see fit to station a lookout at some more favorable spot.

We note with interest the mathematics used by counsel for appellee, Russell Family, Inc. on p. 12 of its brief, where it is stated that the tug and her tow could have been prevented from striking the bridge at any time before reaching a point 133 feet from the bridge span. As we pointed out in our opening brief, the record shows the forward end of the tow was some 200 feet ahead of the point occupied by the operator, and we again repeat that a lookout so stationed would be in a much more favorable position to make observation and give warning than was the operator.

It is interesting to note that while proctors for Russell Towboat and Moorage Company throughout the trial persistently pointed out the very exceedingly difficult angle from which the tug operator judged the relative height of the end of the boom and the lift span, on p. 14 of the brief filed by said appellee, we find its counsel taking an almost diametrically opposed position and saying that " * * * the pilot of the tug could see plainly everything ahead of him * * * ." Unfortunately counsel for appellee is forced to take one or the other horn of the dilemma. If the pilot of the tug could see as it is now contended in appellee's brief, then he is guilty of negligence for blindly running down upon the bridge under the circumstances. If he could not see as was contended by counsel at the trial, he was equally negligent and imprudent in proceeding into a position from which he could not extricate himself before determining whether or not the boom which extended in the air some 100 feet would clear the bridge.

It is further interesting to note that counsel for appellee, Russell Towboat and Moorage Company, insists on putting its lookout in the most unsatisfactory place possible. He says such lookout on the forward end of the crane barge would have been directly underneath the top of the boom. The record shows (Ap. 276) that the crane barge had a beam of approximately 34 feet. The pictures of the equipment which are in evidence show that the boom was a comparatively narrow member. We are justified in assuming that a lookout could have been some 15 or more feet to one side from the boom if such position would have given him a better opportunity to observe and to perform the functions of a proper lookout. If one lookout was not sufficient under the circumstances, then the tug should have had more than one lookout and should have had that lookout in the most advantageous spot possible to perform the essential functions of a lookout.

We hope we have not labored this point too much, but apparently we did not make our position clear in our opening brief inasmuch as counsel for appellee, Russell Towboat and Moorage Company, has said on p. 12 of its brief that we somewhat weakly suggest that the tug was not proceeding prudently. In the light of the facts disclosed by the evidence that without giving any signal and therefore, without having any right to assume that the bridge was opening for its passage, appellees' equipment bore down upon the defenseless bridge with the boom on the crane barge some 110 feet long extended upward like a lance aimed at the shield of an opponent, with the pilot in a place from which it was admittedly

most difficult for him to judge the height of the bridge in relation to the end of said boom, with no lookout at a place of vantage and with equipment extending forward at least 200 feet and with an alleged ability to stop at a distance not to exceed 133 feet, continuing forward in the face of a five mile current at a speed estimated by appellees' own witnesses at approximately one and one-half miles per hour and not discovering the imminent impact until within some 10 to 15 feet of the bridge span. All of this seems to us like gross negligence, reckless disregard for the right of others, a hap-hazard, devil-may-care attitude, most extremely removed from prudence or care or caution. We hope we have not weakly suggested that the equipment was not proceeding prudently. If we knew how to say more forcefully and effectively that the tug was not proceeding prudently we would do so.

POINT II

What might constitute due diligence at Hood River would not necessarily be due diligence in Portland, Multnomah County, Oregon.

Appellee, Russell Family, Inc., has tried to obtain some comfort from the testimony of the witness, Edward E. Stackhouse. His testimony very definitely shows the difference between the Willamette River in Portland and the Columbia River at the Hood River-White Salmon Bridge. He testified (Ap. 21) that (in Portland) the boat gives a signal, the bridge answers that signal and when the answer has been given, the boat then has the all-clear. In other words the vessels which go through

the bridges in Portland, according to the testimony of Stackhouse, are required to give a signal and to wait for an answering signal from the bridge before they are entitled to approach the bridge and assume that the bridge will be opened. In answer to the Court's question (Ap. 225) witness Stackhouse said that the signals to oncoming traffic were given by reason of regulations of the War Department. Inasmuch as the witness Stackhouse was willing to testify that it was customary to have the type of whistles he described on bridges in Multnomah County on the bridges on the Columbia River (Ap. 220) and he later admitted that he had never worked on any bridges in the Columbia River and didn't know what kind of equipment they had (Ap. 223-224), we are somewhat dubious as to the value of his testimony. However, if we give it face value, it very definitely shows that the War Department considered different regulations necessary in the Portland Harbor from those at Hood River on the Columbia River, because if we accept Stackhouse's testimony, every vessel was required to give a signal and the bridge an answering signal before it proceeded (Ap. 221) through the bridges in Portland, whereas, at the Hood River-White Salmon Bridge, the government regulation did not require the bridge to give an answering signal.

The record shows, however, that out of abundance of caution and in excess of the minimum requirements set down by the federal authorities, a whistle had universally been blown when the bridge was in readiness for the vessel to proceed after the draw had been raised in the Hood River-White Salmon Bridge.

There is another significant factor in Stackhouse's testimony. In answer to the question, "Have you had power failures on the bridges?" he answered, "Oh, yes, we have those quite frequently" (Ap. 224). If, as a matter of fact, there were power failures quite frequently in the Portland area this may explain the requirement of the federal government that the bridge give an answering whistle before a vessel may proceed through the Portland bridges, whereas, it did not make such requirement at Hood River when the record shows that only on two occasions had there been a power failure which involved the Hood River-White Salmon Bridge. The frequency of power failures in Portland, the infrequency of power failures at Hood River, very likely explains the difference in the regulations, both of which were enacted by the War Department under Congressional authority.

However, the record does show that it had become standard practice to blow the whistle twice—two short whistles—before river traffic started to go through the Hood River-White Salmon Bridge after the span was raised (Ap. 192, 200, 211, 212, 285).

The pertinent part of the Bridge Regulations in effect at the time the accident occurred were admitted in evidence as libelant's exhibit No. 16. Appellees offered in evidence as respondents' No. 4, a document claimed to be the present regulations of the U.S. Corps of Engineers relating to the Hood River-White Salmon Bridge. It was pointed out by Mr. Chandler (Ap. 202) under these regulations the burden is definitely placed on the ship to wait for an affirmative signal from the bridge before it

may go through the span when it is lifted. Under the present regulations the vessel dare not approach the bridge unless it receives a green flag by day, or a green light at night. In other words, the War Department has shown it recognizes that the rule applied in the many cases cited by appellees will not work in the Columbia River at Hood River and it has made its new regulations in recognition of this fact. Vessels can only go through the bridge when signalled to do so.

As distinguished from the situation in the Louise Rugge, 234 F. 768, where there were many bridges and where it was deemed improper for the vessel operator to be required to satisfy himself that the signal given by him had been received and understood and therefore the burden put on the bridge operator to get the draw out of the way at his peril, in our case under present regulations, the War Department puts the burden on the ship operator and requires said operator to await an affirmative signal from the bridge before the vessel can approach the bridge when it is necessary to raise the lift span.

As pointed out by Mr. Chandler, when the power is off the whistle is of no effect. We assume the Court will take judicial notice of the fact that the Hood River-White Salmon Bridge is located at a point on the Columbia River where the wind blows rather strongly; sometimes up the gorge; other times down the gorge. On the day of the accident it was pointed out that the wind was blowing up-river. This is another reason why a whistle is not a particularly effective mode of signalling at the Hood River-White Salmon Bridge (Ap. 287).

On p. 5 of the brief of appellee, Russell Towboat and Moorage Company, it is said the proposition that, in the absence of proper warning, a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic is supported both by reason and authority.

It is correctly stated that Clement v. Metropolitan West Side Electric Company, 123 F. 271, is an oft quoted case. This case shows there are two conditions precedent before the proposition becomes valid: (1) The approaching vessel must have given a proper signal; (2) It must be prudently proceeding under slow speed.

Neither of these conditions were met by the tug operator. It is admitted he gave no signal. Though it may be argued that this made no difference in the activities of appellant's employees, we have already pointed out that in the absence of the signal required by regulation, the tug operator had no right to assume that the draw was being lifted for him to proceed rather than for test purposes as required by regulation. The tug certainly was not proceeding prudently with no one on watch and with the tug operator in a position from which he admittedly could not make accurate observations. It is therefore clear that appellee has not brought itself within the rule as stated in the authorities.

Insofar as reason is applied to this particular case the considered judgment of the responsible federal agency for all bridges over navigable waters has not permitted the vessel operator to assume that the bridge will be opened for traffic. In making the current regulations for

the Hood River-White Salmon Bridge the War Department has reversed the usual procedure and has required the vessel to wait and to proceed only after an affirmative signal. We are entitled to assume that the accident out of which this litigation arises was one of the important factors taken into consideration by the War Department in making the new regulations. Mr. Chandler was the one who made suggestions to the War Department (Ap. 202). It did not reason that the vessel should proceed toward the bridge and assume that the bridge would be timely opened.

When the trial judge concluded that appellant was negligent for failing to provide an auxiliary signal not dependent upon its power supply, he reached an impractical conclusion. The best proof of this is the current regulation by the War Department. It surely cannot be contended that Mr. Chandler in any way failed to exercise the care of an ordinarily prudent man when he meticulously complied with every requirement laid down by the one agency most experienced and we are entitled to assume best qualified to determine what should be done to safeguard vessels navigating the river. In fact appellant had gone beyond the requirements of due care as set out by the War Department in its regulation and had established the practice of blowing a whistle when the draw had been raised for river traffic. On p. 12 of the brief of appellee, Russell Towboat and Moorage Company, an attempt is made to answer our criticism that the tug did not wait for an affirmative signal from the bridge before attempting to proceed by saying "It is sufficient answer to this that the U.S. Engineers' official reg-

ulations governing this Bridge did not require any 'affirmative sign.' " By the same reasoning it was sufficient that the bridge operators had complied with all U.S. Engineers' official regulations governing this Bridge and that they did not require any auxiliary whistle or emergency flag. If navigators are entitled to govern themselves according to the official regulations, so is the bridge operator.

The important point is that the bridge operator complied with all regulations. The tug operator did not.

POINT III

Appellant's bridge did not need a draw span until the level of the water was raised by Bonneville Dam.

We feel it is important to keep in mind that the Hood River-White Salmon Bridge as originally designed did not need a lift span and did not have a lift span. It was opened for traffic in December, 1924. It had no lift span until after the level of the water was raised at the building of the Bonneville Dam. This dam was completed in April, 1940 (Ap. 173). The War Department participated in designing the lift span and it was paid for by the Federal Government (Ap. 190).

In our case then, we are faced with the novel situation that the bridge was not constructed so as to be a barrier or hindrance to navigation, but after the bridge was built and had been in use for a number of years, the level of the water was built up to the bridge and because

of this building up of the level of the water a lift span was made necessary, which in the absence of such changing of the level of the water was not required.

In Southern Pacific Co. vs. Olympian Dredging Co., 260 U.S. 205, 43 S.Ct. 26, 67 L. Ed. 213, a new bridge was built and an old bridge nearby abandoned. The approval granted by the War Department was on condition that the old bridge would be removed. The conditions imposed were fully complied with. Subsequently a wing dam was constructed and dredging done by the government which caused old stumps of piles to protrude above the existing bed of the river. Thereafter, the dredger "Thor" drifted into the piles, her hull was pierced and she sank. Libel was filed to recover damages, which was dismissed by the District Court but the District Court was reversed by the Circuit Court of Appeals on the ground that petitioners should have anticipated change and should have guarded against the effect of the conditions upon the piles and that their failure to do so was actionable negligence.

The Supreme Court reversed the Circuit Court. It pointed out that Congress had granted the Secretary of War administrative power. It said (p. 208):

> "In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned."

The Court continued by pointing out that petitioners having complied with the lawful order of the Secretary, had met their full responsibility. On p. 209 it said:

> "The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order. * * * * p. 210. They (the petitioners) were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation, was in fact no obstruction."

So, in our case, where appellant's bridge had been constructed in such manner as in no way to impair or impede river traffic and when the river was by an act of the government raised to such extent that it became necessary to put a lift span in the bridge and when the government supervised and paid for this lift span and thereafter through its properly delegated representative agency made rules and regulations regarding the operation of such bridge which rules and regulations were meticulously adherred to by the operator, said operator cannot be deemed negligent for failing to anticipate some unusual situation and in not providing some device not mentioned nor called for by any rule or regulation of the War Department. By the same reasoning used by the Supreme Court in the Southern Pacific Co. vs. Olympian Dredging Co. case, the condition imposed by the War Department cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done. Inasmuch as it did not require an emergency whistle or an auxiliary signal, appellant can-

not be held negligent for not having such equipment. Under the reasoning of the Supreme Court in the language above quoted it had made an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the bridge in question was concerned.

The War Department has charge of all the bridges throughout the country. It has been given the responsibility by Congress to determine what equipment and what rules and regulations are necessary for the operation of each individual bridge. It makes the rules and regulations consistent with the facts and circumstances surrounding each individual bridge. It did this in regard to the Hood River-White Salmon Bridge. All of these rules and regulations were carefully complied with by appellant. There has been an official determination of what is reasonable care and diligence at this particular place and appellant has met that full measure of responsibility. Therefore, appellant cannot be negligent in the only respect in which the Trial Court concluded that it was negligent. The conclusion of the Trial Court is clearly erroneous. The decree based thereon must be reversed.

POINT IV

Appellant makes no contention that there was an "Inevitable accident."

Beginning on p. 6 of appellee, Russell Family, Inc.'s brief, considerable effort is made to show that the burden is "heavily upon the party asserting such defense and is not to be lightly arrived at."

We make no claim of any kind that any damage here complained of resulted from inevitable accident. We feel that we have very clearly pointed out the very glaring negligence of the tug operator which directly caused the accident and damages complained of.

We are sure that, was there not such a close tie up between the appellees, Russell Family, Inc. would not be thinking of inevitable accident but would be joining with us in pointing out the reckless lack of due care of the tug operator.

CONCLUSION

The Trial Judge found no fact that will sustain his judgment. In concluding that appellant should have had an auxiliary whistle or some other signalling device not dependent upon the bridge's power lines, he required more than reasonable care as determined by the War Department, the federal agency charged by Congress with responsibility for determining what care shall be used at any particular bridge and setting out by regulation that which constitutes such care.

Appellee, Russell Towboat and Moorage Company, was culpably negligent in failing to maintain a lookout and, without signalling, in presuming its tow could pass under the raised span and proceeding into such position it could not control its tow after the tug operator learned the tow would not pass under the lift span.

The decree of the District Court should be reversed. Appellant should be awarded damages in the amount of $30,621.18 as shown by the evidence and not questioned by either appellee in its brief. If Russell Family, Inc. is entitled to any relief it must be from Russell Towboat and Moorage Company.

Respectfully submitted,

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